The Timken Company *and* The United Steelworkers of America, AFL–CIO, CLC. Cases 8–CA–28174, 8–CA–28181, 8–CA–28202, 8–CA–28252, 8–CA–28262, 8–CA–28299, 8–CA–28308, 8–CA–28321, and 8–CA–28353

July 13, 2000

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On March 10, 1997, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Union filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that The Timken Company, Bucyrus, Ohio, it officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER BRAME, concurring.

I write separately solely concerning the finding that the Respondent violated Section 8(a)(1) of the Act by photographing and videotaping employees' protected, concerted activities.[1] I agree that the Respondent violated the Act in this instance, but only for reasons stated below.

Section 8(a)(1) of the Act forbids employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7." Section 7 in turn confers upon employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from such activities.

In my concurring opinion in *Randell Warehouse of Arizona,* 328 NLRB 1034 (1999), I concluded allegations that photographing or videotaping, by an employer or a union, whether in an unfair labor practice or election objections context, should be judged under "all the circumstances." The ultimate test is "whether the conduct, in the circumstances, may reasonably tend to instill in the minds of the employees photographed a fear of economic or physical reprisal." Id. slip op. at 1048. To aid in this fact-specific analysis, I suggested a flexible five-part test:

> (1) Whether the photographing occurred in the context of serious independent unfair labor practice

[1] The Respondent excepted only to those findings and conclusions concerning the Respondent's access rules and related surveillance, and to certain credibility findings. Thus, the Respondent did not except to the findings that it violated Sec. 8(a)(1) by prohibiting employees from discussing the Union among themselves while working and by threatening an employee with discipline for observing handbilling from his work area.

The judge dismissed allegations concerning the battery of a union supporter by a manager; disparate enforcement of no-solicitation/no-distribution and bulletin board rules; the disciplinary counseling of two employees for harassing another employee who withdrew her authorization card; and the issuance of company parking violation notices to a union supporter. The General Counsel did not except to these findings.

[2] The Respondent has excepted to the judge's credibility resolutions. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We find it unnecessary to rely on the judge's discussion of *Lechmere, Inc.,* 502 U.S. 527 (1992). That case involved the rights of nonemployees to access to an employer's property, not the rights of employees, as here.

Member Hurtgen agrees with the judge that Respondent's photographing violated Sec. 8(a)(1). Member Hurtgen dissented in *Randell Warehouse of Arizona,* 328 NLRB 1034 (1999), and would have found the union's photographing there to be objectionable. He also expressed the view that allegedly objectionable photographing by employers and by unions is to be adjudged under the same standard. Under that standard, the photographing there was objectionable in Member Hurtgen's view. However, the instant case is an 8(a)(1) case. In *Randell*, Member Hurtgen did not pass on the issue concerning the circumstances under which employer photographing violates Sec. 8(a)(1) and whether this issue is to be adjudged under the same standard as union photographing under Sec. 8(b)(1)(A). In this regard, he noted the narrower breadth of 8(b)(1)(A)'s language. Member Hurtgen agrees that the instant employer photographing falls within the broad language of Sec. 8(a)(1).

[1] I agree with my colleagues that the Respondent violated Sec. 8(a)(1) by summoning police in response to protected handbilling activity, by promulgating and disparately enforcing rules limiting the access of off-duty employees engaged in protected concerted activity, at exterior locations near its plant, including highway entrances and pedestrian turnstile entrances.

No exceptions were filed to the judge's findings that the Respondent also violated Sec. 8(a)(1) by promulgating a rule forbidding employees' presence at plant turnstile entrances more than half an hour before the start or after the end of their shift; by counseling employees for talking about the Union while working, and by threatening an employee with discipline for viewing employees engaged in protected, concerted activity.

Also no exceptions were filed to the judge's dismissal of allegations that the Respondent further committed violations of Sec. 8(a)(1) by issuing a written warning and "parking ticket" to an employee; by disparately enforcing rules regarding bulletin board postings and solicitation and distribution; by confiscating union literature; by counseling union supporters for harassing a fellow employee who withdrew her authorization card; and by assaulting an employee.

I also agree with my colleagues that the Respondent violated Sec. 8(a)(3) and (1) by adversely counseling, warning, and suspending employees for violating unlawful access rules.

conduct or unalleged threats of physical or economic reprisal, intimidation, or actual violence.

(2) Whether the activity photographed was carried on in an open and public way, including whether the activity involved trespass.

(3) Whether the photographing took place at the employer's premises, at the union hall or a union-sponsored event, or at a location unconnected with either party.

(4) Whether the photographing was done in a "conspicuous" manner that would suggest it was intended as a prelude to reprisal.

(5) Whether the party photographing the activity had a "legitimate" or "proper" justification as previously recognized by the Board.

Id. at 1047–1048 (footnotes omitted). I also emphasized in *Randell* that, as with similar standards applied to ascertain the legality of employee interrogations, these criteria "are not prerequisites to a finding of [unlawful conduct], but rather useful indicia that serve as a starting point for assessing the totality of the circumstance." Id. at. 1048, quoting *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (1998) (internal quotation marks omitted), quoting in turn *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

Here, there is no dispute that, by distributing prounion handbills outside the plant to fellow workers during an organizational campaign, employees engaged in conduct sheltered by Section 7. The question is whether the Respondent's photographing and videotaping of the handbilling constituted interference, restraint, or coercion within the scope of Section 8(a)(1).

On April 4, 1996, in the midst of a union organizational campaign, and continuously thereafter, the Respondent videotaped and/or photographed employees passing out union literature at the east turnstile entrance to its plant. The parties agreed that the photographing occurred whenever more than two employees were at the east turnstile distributing union handbills or standing with those who did.

Respondent's asserted reason for the picture taking stemmed from an incident the previous evening, in which an employee, Ron Grandstaff, alleged that Respondent's human resources manager, Robert Arbogast, had assaulted him at the east turnstile. Grandstaff first filed, then withdrew, a criminal complaint against Arbogast. My colleagues and I agree with the judge's dismissal of an allegation that Respondent violated Section 8(a)(1) based on this conduct. The Respondent claims its motivation for the photographing was to protect Arbogast and its security personnel from unfounded charges, as well as to have a record for any subsequent litigation. The photographing, however, was not limited to periods of time when Arbogast or security personnel were present at the east turnstile.

In its brief, the Respondent points out that "photographs were only taken where the two-person limitation was ignored." My colleagues and I have, however, found this restriction imposed on employee access at the turnstiles unlawful.

Applying the *Randell* factors outlined above, I am compelled to join in my colleagues' finding of a violation.

Regarding the first, we have found that Respondent committed other significant unfair labor practices. Most pertinent is the restriction against more than two employees congregating at turnstile entrances. Respondent admits that employee violation of this unlawful rule triggered photographing at the east turnstile, notwithstanding the presence or absence of Arbogast or security personnel. Respondent has filed no exception to the judge's finding that Respondent illegally promulgated a rule banning the presence of employees at plant turnstile entrances more than half an hour before the start or end of their shift. Respondent also unlawfully forbade distribution of literature at highway entrances to the plant except in designated areas. Other violations of Section 8(a)(1) included summoning police to enforce the latter rule, counseling employees for talking about the Union while at work, and threatening an employee with discipline for watching protected concerted activity.

In addition to the promulgation of unlawful access rules, the Respondent, we have found, violated Section 8(a)(3) and (1) by counseling, warning, and/or suspending 44 employees for violating those same rules.

Thus, the judge's finding that "the pervasive photographing and videotaping unlawfully complemented the invalid access limitations and their unlawful enforcement" is sound. The weight of this factor in the particular circumstances here is decisive. Where employees are being disciplined for violating unlawful rules, and photographing occurs that may be used to document such infractions, it is inevitable that "the conduct, in the circumstances, may reasonably tend to instill in the minds of the employees photographed a fear of . . . reprisal."[2]

Factors two and three are unavailing because of the circumstances described. That the handbilling activity photographed took place openly and at the employer's premises would, in my view, have strongly militated against finding the violation had not the employer committed the particular unfair labor practices noted, especially promulgating and enforcing unlawful access rules.[3] There is no evidence whether the photographing was "conspicuous," factor four, but its absence cannot aid the Respondent here; evidence of its presence would merely aggravate the coercive nature of the conduct.[4]

[2] *Randell Warehouse*, supra, at 1048 (Member Brame concurring).
[3] Supra at1047 fns. 76 and 77 in my *Randell Warehouse* concurrence.
[4] Id. at fn. 78.

The Respondent cannot find support in the fifth factor, because its justification, to protect Arbogast and its security agents, is too severely undercut by the continuous nature of the photographing—going beyond times when company personnel were present—and by the fact picture-taking commenced upon an indication that an unlawful rule had been transgressed.

Accordingly, I am satisfied that the Respondent's photographing and videotaping infringed on the employees Section 7 rights under the Act and ran afoul of Section 8(a)(1).

Nancy Recko, Esq., for the General Counsel.
James K. Brooker, James R. Blake, and *Robert J. McBride, Esqs. (Day, Ketterer, Wright & Rybolt, Ltd.),* of Canton, Ohio, for the Respondent.
Mark A. Rock and *Ann Knuth, Esqs. (Schwarzwald & Rock),* of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. The original consolidated complaint was issued by the Regional Director for Region 8 against the Timken Company (the Respondent), on June 13, 1996, in all the above-captioned cases except for Case 8–CA–26353. A second order consolidating cases, complaint, and notice of hearing was issued on July 19, 1996, in Case 8–CA–28353. An amendment to complaint was issued on August 14, 1996. The complaints were issued pursuant to unfair labor practice charges filed by United Steelworkers of America, AFL–CIO, CLC (the Union or the Charging Party). The consolidated complaints, as amended, will be referred to hereinafter as the complaint. The complaint alleges violations of Section 8(a)(1) and (3) of the Act that allegedly occurred on various dates from February 23 through June 20, 1996, during the Union's futile organizing campaign at Respondent's Bucyrus, Ohio plant facilities. The Respondent is alleged to have unlawfully interfered with employees' union literature distribution and handbilling and union solicitation by restricting employee union handbillers' access to a certain location at the public highway entrance to the facilities' parking lots; by limiting the distribution of union leaflets at the pedestrian turnstile fence entrances to the interior plant facilities located beyond the parking lot; and by initially placing, although subsequently abandoning, a limitation of access to or presence at the plant turnstile entrances to employees who were scheduled to start work no longer than 30 minutes or whose work shift ended not more than 30 minutes before such ingress or presence. The alleged interference with employees' statutory rights took the form of unlawful surveillance by camera, "counseling" (which Respondent argues does not constitute discipline), warnings, parking tickets, police enforcement, and suspensions to certain employees who refused Respondent's orders to leave designated areas in compliance with the above restrictions, which employee refusal was and is characterized by Respondent as insubordination. It is also alleged that Respondent's manager perpetrated an assault and battery upon one employee who refused an order to comply with an unlawful restriction on his attempt to engage in unprotected activity at one turnstile entrance.

In argument and in proofs, the parties recognized the foregoing allegations to constitute the most significant issues.

The complaint also alleges that certain employees were disciplined with counseling for discussing the Union in violation of a no-solicitation rule in Respondent's employee handbook which the General Counsel argues was disparately enforced.

The complaint further alleges as unlawfully discriminatory, the disparate enforcement of the employee handbook rule regarding bulletin board postings by similar disciplinary warnings to certain employees. Related issues are Respondent's enforced limitations upon the placement and its confiscation of open, face up, union literature in working areas, employee personal property, open-faced storage racks known as "cubbyholes," and from the tops of certain employee's toolboxes in working areas.

Finally, the complaint also alleges that Respondent unlawfully disciplined an employee with a verbal warning because he had, during the performance of his work duties, stopped to look out of a nearby open overhead door opening to view the union employee leafleting at one of the fence entrance turnstiles.[1]

Respondent's timely filed answers and position at trial admitted much of the allegations but denied the commission of unfair labor practices. In essence, Respondent takes the position that it was exercising its lawful right to control the use of its property and to maintain discipline and safety on its premises and at entrances to its premises by placing reasonable limitations upon the numbers of employees engaged in leafleting at the turnstile entrances and those nonleafleting employees who, in support of the leafleters, stood with them, and by limiting the area where they leafleted at the highway entrance to its parking lot. Respondent argues that it did not prohibit access because, despite the limitations, effective leafleting did occur near those areas as well as in the plant cafeteria and locker rooms, and, in effect, by employees who were permitted to and did wear union insignia on their clothing in the plant during working time. Respondent denies the alleged assault and battery. It admits the photographing and videotaping of employee leafleting at the turnstile entrances on a daily basis after the alleged assault and battery, but claims that it was done for the purpose of protecting its managers and security guards from subsequent false claims of assault and battery.

Respondent denies that its preexisting no-solicita tion/distribution rules and its restrictive bulletin board rules were disparately or discriminatorily enforced. Respondent claims that its personnel actions were based on insubordinate refusal by employees to obey the requests of its manager and agents to remove themselves from the area because they were in excess of the number permitted at the turnstile, or

[1] The complaint (GC Exh. 1(s)) was amended at hearing in the following respects: par. 5 at p. 3, the name Larry Morton was amended to read "Larry Young" and the name of Paul Frankenhouser was deleted; par. 6 at p. 3 was withdrawn; par. 7 at p. 3 was withdrawn; par. 33(A) at p. 7 was amended to read ". . . in violation of the rule described above in pars. 9 *and/or 12*"; par. 35(A) at p. 8 was amended to read ". . . in violation of the rule described above in pars. 9 *and/or 12*"; par. 39(A) at p. 9 was amended to omit reference to the "five day disciplinary suspension"; and par. 40 at p. 9 was amended to include the following employee names and suspensions: Robert Berry, 5 days and Nancy Seybert, 5 days.

south of an area designated by it at the northern highway entrance.

Respondent contends that personal actions and confiscation of employee union literature were justified as a consequence of violations of its lawful preexisting no-solicitation/distribution and posting rules, and as a consequence of other employee complaints of harassment by employee union solicitors and/or leaflet distributors.

The complaint was litigated before me at trial held in Bucyrus, Ohio, on September 11, 12, 13, and 14, 1996. The parties were given full opportunity to and did adduce documentary, photographic, schematic, stipulated, and testimonial evidence of 55 witnesses of whom 45 were summoned by the General Counsel. In a 4-day litigation, the parties, by virtue of cooperation and highly professional behavior, were able to compile a testimonial record of over 1000 pages. Briefs were received by the judges division no later than November 19, 1996.

The briefs submitted by the parties fully delineate the facts and issues and, in form, approximate proposed findings of fact and conclusions. Portions of those briefs have been incorporated herein, sometimes modified, particularly as to undisputed factual narration. However, all factual findings herein are based upon my independent evaluation of the record. Based upon the entire record, the briefs and my observation and evaluation of witnesses' demeanor, I make the following findings

I. BUSINESS OF RESPONDENT

At all material times, Respondent, an Ohio corporation, with an office and place of business in Bucyrus, Ohio (Respondent's Bucyrus facility), has been engaged in the manufacture and distribution of tapered roller bearings, tube, and special alloy steels, including bars. Annually, Respondent, in conducting its business operations sells and ships from its Bucyrus, Ohio facility goods valued in excess of $50,000 directly to points outside the State of Ohio.

It is admitted, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent, an international corporation, conducts business in 25 countries on 7 continents and employs 17,000 people. Some of the Company's plants are unionized and in the United States, the unionized employees are represented by the Charging Party.

The bearing plant heat treat division and distribution center at Bucyrus employs approximately 850 hourly employees and is not unionized. The United Auto Workers and the Charging Party Union have conducted multiple organizing campaigns at Bucyrus during the 1970s, 1980s, and 1990s. Prior to the current campaign, the most recent union campaign and Board-conducted election took place in 1993.

A 60-foot-wide, east-west-county highway designated as Route 330 constitutes the northern border of the Bucyrus facility property line. There are two entrances, a west entrance and an east entrance, to Respondent's property from Route 330. Respondent maintains a large parking lot utilized by members of management, employees working in the bearing plant, and visitors to the facility. Employees working in the distribution center park in a separate parking lot south of the bearing plant and adjacent to the distribution center. The distribution center is located approximately one-half mile south of the bearing plant. A security fence encloses all manufacturing and warehouse operations.

Respondent limits access to its property to people who have business with it and its employees. However, employees' family members are permitted on the property for brief periods of time and tow trucks and mechanics are permitted in the parking lot to deal with disabled vehicles, and a Red Wing Shoe truck has periodically appeared just north of the turnstile entrance to solicit sales.

After entering Respondent's property through the west or east driveway entrances, employees of the bearing plant park in the parking lot between Route 330 and the encircling fence. Two turnstile entrances provide access through the chain link fence which separates the bearing plant from the parking lot. The turnstiles are over 6 feet in height and have multiple tines. Hourly employees are free to enter through either the east or west turnstile, but the vast majority utilize the east turnstile which is closer to production areas. Each employee is provided a personal magnetic bar-coded identification card which is passed or swiped through a scanner attached to the locked turnstile assembly. After the card registers in the computerized time and attendance system, the identity of the employee is registered, the turnstile spins and thereby allows the person activating the turnstile to enter through the fence. After the employee enters, the turnstile is again locked. Each specific work area has its own scanner which must be swiped when the employee arrives there.

For payroll purposes, that work area swipe recordation is utilized by the payroll department to commence computation of the employees' shift hours.

The east turnstile is covered by an orange canopy supported by several metal poles. Immediately to either side of the turnstile are a garbage container and a recycling container. The scanner which reads cards to permit access to the turnstile is to the west of the turnstile. Large yellow poles surround the east and west sides of the turnstile. The physical layout of the turnstile made it impossible for an employee handing out union literature to stand directly next to an employee situated within the turnstile itself. To the east of this turnstile is a bicycle rack. The guardhouse is approximately 176 feet west of the east turnstile and parallel to it. There are several parking spaces between the east turnstile and the guardhouse designated for the use of visitors, plant vehicles, and the handicapped. On occasion, there are large recycling bins placed in those parking lots.

The guardhouse itself is a single-story, slab foundation, flat roofed brick structure, elevated only slightly above ground level. It is located at the western edge of Respondent's property. Immediately west of it is the 25-foot-wide main entrance road which runs directly north to Route 330. The east wall of the guardhouse has one door and two windows. Contiguous to its east wall is the path to the west turnstile beyond which is the plant office area. The east-west

fence ends at a point somewhat south of the guardhouse's midsection.

The west turnstile is south of the fence. The view from the guardhouse's east windows is immediately partially obstructed by a structure that resembles a typical clear, plexiglass walled transit bus stop. The so-called bus stop serves as a place for employees to gather and wait, either before their shift or afterward, for rides to their homes. There have been no restrictions ever put on the number of employees who may stay within that bus stop. It is about 10-feet long and its length parallels the fence so that several bodies of persons therein would significantly block the east view of the guardhouse, as would any cars parked in the 12 spaces along and north of the fence between the bus stop and the east turnstile. The view is also partially obstructed by recycling bins periodically placed in the parking area. I agree with the General Counsel that at best only the upper third of the east turnstile is clearly visible to the guards in the guardhouse for any practical purpose for any significant period of time.

Prior to the installation of the turnstiles in 1994, employees gathered outside a chain link fence gate until it was unlocked one-half hour before the start of a shift. A security shanty was located directly next to the gate and a security guard, either in the shanty or beside it, would observe employees entering the facility after the gate was unlocked. Employees would show their badge to the security guard when entering through the opened gate. The present turnstile system has replaced the badge system. The security shanty was replaced by the guardhouse. No security guard is located at the east turnstile.

According to the testimony of Robert Arbogast, Respondent's human resources manager, the Bucyrus facility management first heard rumors of the Union's organizing efforts in late 1995. In February 1996, union supporters began to congregate at the driveway entrances to the Respondent's facility. On March 28, 1993, employees in support of the Union began to pass out handbills at the east turnstile entrance to the plant.

Prior to the onset of the current union organizing campaign, Respondent maintained a handbook which contains rules of employee conduct. The handbook has a series of general rules, the violation of which can lead to discipline, up to and including discharge, including the following:

> Distributing literature of any kind in work areas at any time. Associates cannot solicit for any purpose or collect money for any purpose whatsoever or distribute literature of any kind on working time.
>
> . . . .
>
> Entering or leaving the premises without authorization.

There is no rule in the handbook which restricted employee access to the Respondent's plant or parking lot more than one-half hour before or after their shift. There is no rule in the handbook which forbids more than two employees from standing at the turnstile entrances or, for that matter, any place outside the plant. There is no rule in the handbook which requires that employees who wish to distribute literature at Respondent's driveway entrances must stand only at designated areas.

B. Limited Access and Related Issues

1. Facts

a. Nonobjectionable handbilling

With respect to leafleting, Respondent did not object to the distribution and placement of union literature in its cafeteria or in the locker rooms. At the distribution center, it actually accommodated the employee handbillers. The distribution center, located approximately one-half mile south of the bearing plant, is a busy operation with numerous trucks arriving and departing. Due to safety concerns because of the truck traffic, limited parking, and a limited security force, the Respondent limits access to the distribution center. Respondent, nonetheless, has assisted union handbillers who wished to leaflet at the distribution center. When employees expressed a desire to handbill at the distribution center, the Respondent transported them there in a company vehicle, dropped them off, and then picked them up at a time designated by the handbilling employees.

b. Route 330 handbilling

Since February 1996, handbillers frequently gathered in the areas around the east and west driveway entrances on Thursdays. The Respondent has not attempted to impose limitations on the number of people that may gather on its property north of the stop signs at each entrance way. The Respondent has permitted union organizers employed by the Union and other nonemployees to gather and handbill near the entrances north of the stop signs. At times, as many as 55 people have gathered near the entrance ways.

The stop sign at the west entrance is 33 feet south of the property line contiguous to Route 330. The stop sign at the 20-foot wide east entrance is only 5 feet from the property line. The entire area between the highway and parking lot is flat, grassy ground with a slight depression for rain drainage. About 35 feet south of the west stop sign is the entrance to the first row of the paved employee parking lot. West of the main entrance driveway, between that road and a fenced-in neighboring retail complex, is a row of large evergreen trees. At the intersection of the main entrance road and Route 330, there is an overhead suspended traffic light signal that is cycled to activate at the 3–3:30 p.m. shift breaktime to facilitate employee egress.

Arbogast testified that on unspecified dates, probably in early April 1996, he perceived a potential safety problem to exist at the west entrance by virtue of group employee handbilling south of the stop sign. He explained that in excess of 125 trucks, including large tractor-trailers must negotiate a sharp turn south and some employee vehicles, after turning south onto the main entrance road, must, in about 65 feet, turn east onto a parking lot lane. Arbogast testified that employee handbillers positioned themselves in the center of the main entrance road lined up with the overhead suspended traffic signal light and attempted to distribute handbills to incoming traffic. He testified that he concluded that this caused no safety problem if they remained north of the stop sign even though that would have forced the handbillers closer to Route 330, and that he so ordered them to do so. Arbogast testified that on April 11, many times he ordered employee handbillers to move north of the stop sign, i.e., closer to Route 330. Employees Ralph Hart and Nancy Seybert refused his order and remained south of the stop sign without vocally responding to him or even acknowledging

his presence. Another employee who was with them complied with his order.

On the evening of April 11, Arbogast summoned a deputy sheriff who appeared and who unsuccessfully attempted to persuade Hart and Seybert to move northward. Arbogast testified that his instruction to the sheriff was to make sure that "the area" stayed open. There is no clear, coherent evidence of any blocking of incoming or outgoing traffic. Nor are Arbogast's safety concerns apparent inasmuch as his orders would appear to move handbillers closer to highway traffic. Nor is it clear that incoming or outgoing employee vehicles were actually impeded in making any turns. Indeed, only those using the first parking row would have had to turn immediately. There are four rows of employee parking. However, there is no showing that leafleting was in any way impeded by employees who chose to comply with Arbogast's order, and apparently many did so. Seybert and Hart were subjected to Respondent's counseling, i.e., they were subsequently interviewed by Arbogast, told they had been insubordinate and they were warned of future discipline. A memorandum under the counseling procedure was placed in the departmental file in the office of the manager of the area of the plant where the employees worked. No memorandum, under this procedure, is placed in the employee's personnel file in the human resources department. Despite the fact that Respondent and many employees do not characterize "counseling" as "discipline" per se, some employees do and indeed were told they were disciplined when they were counseled.[2] Although counseling is used in situations of employee good performance recognition and as a tool for educating employees as to plant policy, a counseling memorialization of improper conduct clearly constitutes an adverse personnel action regardless of what it is called. This is so because, as was conceded by Respondent witnesses' testimony, the memorialization may be relied upon by the manager in future situations where that manager may decide upon a more severe course of action because of the past history memorialized in that counseling record.

c. The half-hour-access rule

On the afternoon of April 4, Arbogast and/or his security guards approached a group of employees who were either handing out union leaflets or who were assisting and supporting that effort. He and his agents told them that they were in violation of a company rule which precluded their presence there at a time more than a half-hour before or after their shift start or shift end. Those employees were in fact off duty by more than a half-hour. They refused to obey the order to leave Respondent's property. On April 4, 1996, employees Glen Crum, Louis Niedermier, Larry Beck, Ralph Hart, Roger Eldridge, Ron Grandstaff, and Bob Berry were counseled by Arbogast in a manager's office at the plant. They were informed that on April 3 they had been "unauthorized to be on company property." Their memorialized counseling memorandum further reflected that they had violated a longstanding policy that precluded their presence "on the premises 30 minutes before or after the shift." They were further told and it was memorialized that they had been insubordinate by refusing to comply with the rule and obey a direct order to leave. It was related therein, ~~as was in virtually all counseling he~~rein, that "any further ally all counseling herein, that "any further violations will be subject to disciplinary action up to and including discharge."

Arbogast testified that such a rule had long preexisted the 1995 union effort. However, he himself was newly employed at the plant in the spring of 1995 and of little competency to testify as to past policy and practice. Evidence of the so-called half-hour rule's preexistence as expressed in employee notices in 1990 and 1994 clearly refers to access to the plant building and not presence in the parking lots or at the turnstiles. Arbogast testified that he was unaware of any problems regarding employee congregations before 1996, but again he did not specifically monitor the parking lot and fence areas.

Four employees, one of 27 years' seniority, testified credibly and without contradiction to the lack of enforcement of such rule as to locker room gatherings of off-duty employees in the presence of supervisors; the daily practice of five to six employees gathering 1 hour before shift start in or near the bus stop who, upon arrival of the entire group, proceeded to the cafeteria for coffee; gatherings of up to six off-duty employees at the west turnstile waiting for the next shift; and finally, according to a former security guard from 1970 to 1988 and now production employee, gatherings of 40 to 50 employees at the gate entrance 45 minutes or more before shift start who were not told to disperse.

Arbogast gave no coherent explanation for the enforcement of a rule not previously addressed to nor applied to outside-the-plant building presence, and which in effect constituted a new rule never before in its present form announced to any employee prior to the 1995–1996 union campaign. After consultation with legal counsel, Respondent ceased enforcement of the half-hour rule after April 4. However, the counseling memoranda remain, and there has been no announcement to employees rescinding the rule.

d. The two-person limitation

Respondent argues that it has not permitted employees to congregate en masse outside the turnstiles at any time since their installation and that prior to the current union campaign, there has been no occasion to test that "policy" because there had been no occasion for employee congregation at the turnstiles since their installation. The argument is premised upon some very limited remarks by Arbogast in cross-examination wherein he referred to no such "policy." What Arbogast did testify to was that "people don't stand at the turnstiles . . . . When people come to work, they walk in, they swipe and they go to work, they don't congregate at the turnstiles." In further explanation of his competency to testify as to 850 production employee practice of accessing the plant, he conceded that this conclusion is based upon mere casual observation by himself when he enters the plant and when he, on some unspecified number of times, stared out of his northern facing office window at the west end of the plant. Prior to the union campaign, he admitted that he did not position himself in the guardhouse and watch entering employees. There is no other evidence in the record, documentary or otherwise to support the conclusion that Respondent had any policy as to how many employees could position themselves at the turnstiles. Furthermore, it is undisputed that there was no limit on the number of employees who lingered in the bus stop.

[2] One supervisor referred to it as "discipline" in his testimony.

Arbogast testified that the two-person turnstile rule which limited the number of employee leafleters as well as any other employee standing with them to no more than two persons was precipitated by the current union campaign. He testified that it was formulated and effectuated pursuant to a joint discussion between himself, the general manager and corporate headquarters representatives and legal counsel in late February or early March 1996. Its unmemorialized effective date, he testified, was sometime in early March 1996. There was no formal announcement made to employees who learned about in on an ad hoc basis when it was enforced at the turnstiles. Initially, as an adverse witness for the General Counsel, Arbogast described the purpose of the rule as:

> to strike a reasonable balance at the turnstile areas to make sure that people can flow through very freely, [and] . . . it enables our security department to insure everything is safe in that area as well as we can visually examine or see who enters the plant . . . [and] it insures safety from the point that if you have large groups of people in the area, what can happen is that people will back into the—or end up into the roadway aisle [between the parking rows and turnstile approach path] at a shift change [which] it is not the safest place to be in any roadway in a plant.

The road he refers to, of course, is actually an east-west vehicular aisle contiguous to the rows of parked employee cars and parallel to the northern front of the fence to the east and the visitor parking area and guardhouse, both of which abut the fence to the west. No evidence was adduced that parking lot speeding near the guardhouse is a frequent phenomenon.

Later, as a Respondent witness, Arbogast amplified the purpose of the rule. He explained that it was important for the guards at the guardhouse to have a clear view of the east turnstile 176 feet away and already obstructed as described above. He explained that a clear view was necessary in order to observe whether employees who had entered had slipped their magnetic cards back through the fence to unauthorized persons who could then enter unobserved by the guards whose view was obstructed. There is no evidence of any kind that such conduct had constituted a problem or had ever occurred.

Arbogast further testified that a clear view from the guardhouse was needed so that the guards could observe any conflicts between prounion and antiunion employees. There is no evidence that such conflicts had occurred prior to the time of the rule's formulation even during past organization campaigns.

There is very little evidence of conflicts between groups of prounion and antiunion employees at the turnstiles or elsewhere thereafter except for a couple of instances of alleged individual harassment to be described hereafter regarding solicitors.

Arbogast further testified that during the deliberations which led to the rule, it was decided that groups of employee leafleters would be intimidating to employees entering the turnstiles. There was no explanation as to why it was decided that two persons would not be intimidating but three would, or that four would, or that five would be intimidating. Respondent introduced the testimony of only two employees who testified to feeling subjectively intimidated by the presence of a group of employees leafleters and supporters at the east turnstile as they entered. One complained to Arbogast after the rule was decided upon. Neither employee explained satisfactorily why they chose not to enter the west turnstile entrance where there was no leafleting. Neither employee felt physically threatened.

Arbogast testified that any employees seen standing with union leafleters were considered by him to have been allied with the leafleters and thus were subject to the rule regardless of what conduct, if any, that allied employee had engaged in at the turnstile. In any event, the multitude of nonleafleting employees counseled, warned, and suspended for noncompliance of the rule, and who refused Arbogast's or his security officers' orders to move, testified that their intent was to support the leafleters, support the Union, or encourage incoming employees by their presence to accept leaflets and to support the Union. Thus there is no dispute that those employees were engaged in concerted activities that would have been protected by the Act in the absence of the two-person rule. In fact, generally, only two persons actually leafleted. Most of the General Counsel's employee witnesses present during confrontations with Arbogast at the turnstiles testified, when asked, that two leafleters were adequate to accomplish effective leafleting. A few testified that two leafleters were not adequate. All disciplined employees corroborated Arbogast that they were given multiple warnings by him at the turnstiles before they were subjected to counseling, formal warnings and, in some cases, suspensions varying from a day to a week.[3] Again, the underlying reason memorialized for the counseling and disciplining was the employees' refusal to obey Arbogast's orders to disperse. Generally, the employees testified that they believed Arbogast's orders were invalid and that they had a right to remain at the turnstile which in fact was the east turnstile where all the confrontation and leafleting occurred.

Arbogast testified that on March 28, he enforced the rule for the first time when he confronted 11 employees at the east turnstile, advised them of the new rule and ordered all but 2 of them to disperse. They complied with his order.

On the evening of April 3, the first episode occurred of noncompliance with Arbogast's dispersal orders under the two-person rule at the east entrance at a confrontation with about 10 to 12 employee leafleters and/or supporters of leafleters, of whom 9 were identified in his notes: Ralph Hart, Roger Eldridge, Louis Niedermier, Don Perdue, Dave Crum, Ronald Grandstaff, Larry Beck, Robert Santer, and Robert Berry. Arbogast testified that some employees were blocking the turnstile by standing in front of it for periods of seconds or an unspecified number of minutes which varied per employee. He could not identify any specific employee. No employee was ever counseled for blocking turnstile entrances. Arbogast made no reference to blocking in his recordation of the event dated April 4. No security guard was called to testify. Arbogast was not corroborated as to the blocking allegation either by another witness, by recorded notes or by counseling memorialization as to this episode or any subsequent episode to which he similarly, vaguely testified that subsequent turnstile blocking occurred. No photo-

[3] The rule was enforced at times when only one or two persons exceeded the limit. About 6 to 12 persons constituted the employee turnstile groups but, on occasion, 20 persons were present. Respondent clearly did not consider the number of persons in the group to be a relevant factor in its enforcement efforts.

graph that was submitted into evidence several disclosed blocking. Subsequent confrontations were photographed and videotaped by Respondent's agents. No videotape was offered into evidence to corroborate Arbogast. The security guard's notes of the event, which were introduced into evidence by the General Counsel, refer to no blocking. They do reflect that after the alleged assault and battery incident which occurred that evening, the leafleters and companions were requested by him, on Arbogast's orders "to allow more room for employees to enter the turnstile [and] . . . those who were still there, (10 to 12) did comply with the request."

Hart, Eldridge, Grandstaff, Beck, and Niedermier all testified that no blocking occurred. I credit their more convincing, corroborated testimony and that of a parade of other employees as to subsequent confrontations and discredit the generalized, vague, unspecified, uncorroborated, unconvincing testimony of Arbogast that any significant blocking of the east turnstile occurred on April 3 or at the following similar episodes on the Thursdays of April 4, 11, 18, and 25, May 2, 9, 23, and 30, June 6, 13, and 20, 1996.

According to the credible evidence of the handbillers and their supporters and photographs, they divided themselves on either side of a 10-foot long open path of at least 6-foot width from the vehicle aisle to the turnstile. To the east, they backed into a bicycle rack which occupied part of the space. To the west at about 10 feet was the angled rear end of a parked vehicle. A photograph (R. Exh. 12), dated April 4, 1996, discloses a view of 3 entering employees with at least 16 persons, i.e., leafleters and supporters divided about equally on either side of the entrance path without even closely suggesting the congestion characterized by Respondent as a "wall of flesh." At least half of the union group is not even paying attention to the entering employees. Their uncontroverted testimony reveals that they often chatted amongst themselves socially about matters not even related to the union campaign. If Respondent possessed photographs of worse congestion, it failed to proffer them into evidence.

At most, the employees moved across the open path along the aisle, momentarily stepping into the aisle or in the path, but not so as to cause any entering person to delay ingress. Except for isolated episodes discussed hereafter, there were no taunts, no gestures, no chants, no heated words, but only even-tempered solicitation to accept a leaflet and to support the Union.

The counseling, warnings, and suspensions issued for insubordinate noncompliance with the rule did not cite any misconduct other than refusal to disperse. All the confrontations at the east turnstile concerning enforcement of the two-person rule from April 3 to June 20, 1996, involved 22 counseling sessions for insubordination, 28 written warnings for insubordination, 5 written warnings with 5-day suspensions, and 30 instances of 1- or 2-day unpaid "Investigation of Rule Infraction" suspensions.

Based on employee responses in the counseling and warning sessions, Arbogast concluded that the employees had acted based on an incorrect understanding of their rights as probably explained to them by the Union. Accordingly, he testified that Respondent deviated from its historic practice of dealing with insubordination by giving a written warning for a first occurrence and immediate discharge for subsequent occurrences.

On the evening of the April 3 confrontation, it is alleged that Arbogast assaulted and battered Ronald Grandstaff, an off-duty employee on sick leave who refused the order to depart in view of six or seven employees. Grandstaff's account of the event was not satisfactorily corroborated by the General Counsel's employee witnesses Ralph Hart and Robert Berry who, in significant detail, corroborated Arbogast. Grandstaff's demeanor was neither spontaneous nor convincing, and his testimony was internally inconsistent. Arbogast was not corroborated by the testimony of the security guard, except for his recorded notes adduced into evidence by the General Counsel which do corroborate Arbogast. I credit the more certain and convincing testimony of Arbogast. I find that at most, Arbogast lightly touched Grandstaff upon the shoulder when he requested him to leave but that when Grandstaff erupted with vehement indignation, Arbogast quickly removed his hand and in effect apologized by saying, "Everything is cool." I find that the incident is too trivial to constitute any significant interference in the form of a bodily attack.

Grandstaff, for a period of time, filed and pursued a criminal charge against Arbogast until he withdrew it on advice of his attorney. Arbogast testified that on April 4, he heard a variety of rumors at the plant to the effect that he had assaulted and battered Grandstaff the day before by a variety of means and that he was going to be arrested. Arbogast testified that in order to protect himself and other Respondent agents from future false accusation, none of which ever occurred, that he would photograph and videotape every subsequent east turnstile leafleting event, which was done continuously thereafter as employees leafleted or stood with the leafleters.

Respondent asserts that it had no intention to coerce employees but merely wanted documentation to protect Arbogast and the security personnel as well as to have a record in subsequent litigation.

It was stipulated by the parties that on all occasions when there were more than two employees at the east turnstile, the employees were videotaped and/or photographed at the direction of the Respondent while engaging in passing out union literature or standing with people who were passing out union literature. That stipulation, as well as employee testimony, indicates that such photographing and videotaping were not limited to periods of time when Arbogast or the guards were present and confronting them.

It is also alleged that the access restriction of employees was enforced by the issuance of a disciplinary warning and a parking ticket to employee Ralph Hart because he violated the two-person limitation rule on about April 4, 1996. The evidence fails to establish that Hart was issued a disciplinary warning for parking in an unauthorized area. He was counseled in April by Supervisor Leslie Keiter for insubordinately refusing to comply with the two-person limitation rule on April 3. Hart did receive a "parking ticket," apparently on April 4, for parking in an unauthorized area, i.e., the visitors' parking lot, on April 3. Apparently, the citation was raised in the Keiter counseling session but how and in what terms is not clear. There is no evidence that Keiter related it to the two-person rule. It is not clear who issued the ticket and when. The nature of the citation was, apparently, an in-house discipline. It is not clear what consequences, if any, arise from such a citation. In any event, Hart admitted that

the area he parked in was reserved for visitors' vehicles but that he chose it because it was "handy." He testified that he did so in the past, but the circumstances were not explained. He admitted that the visitor parking area was an area where he should not have parked his vehicle. There is no evidence of disparity of treatment for such conduct. I conclude that there is insufficient evidence to support any conclusions about this vague and trivial episode.

2. Analysis

Respondent readily acknowledges, in its brief, "that its off duty employees have the right under Section 7 of the [Act] to distribute union literature and to solicit for the union on non-work time and in non-work areas." The General Counsel argues that "the work place is a singularly appropriate place for the distribution of Section 7 material," quoting the Supreme Court's observation in *Eastex v. NLRB*, 437 U.S. 556 (1978), "[the work place] is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life." See *Nashville Plastic Products*, 313 NLRB 462, 463 (1993). Respondent points to the freedom allotted to its employees and nonemployees to distribute literature in large groups at its highway entrances north of the stop sign at Route 330. It points to its assistance to the distribution center handbillers and its tolerance of insignia wearing throughout the plant and literature distribution in the cafeteria as evidence of its nonoppressive stance toward employees' exercise of their Section 7 rights.

Respondent argues that the analysis herein ought not therefore involve access issues because, in its opinion, there was effective access by the Union and employees at the highway entrances and by employees at the turnstiles where effective leafleting occurred because of the ease with which two employees could proffer a leaflet to a single file of employees entering one by one into the turnstile, and also in the cafeteria and in the plant by virtue of insignia wearing. It should be noted, however, that during an 8-hour shift, employees are entitled to only one 18-minute lunchbreak and are allowed no other breaks except for ad hoc personal relief breaks as needed upon supervisory approval. Thus opportunity for solicitation in the cafeteria and in working areas was not as extensive as it might otherwise seem. Arbogast testified that there was little downtime because machines are constantly being tended.

Respondent, however, argues that because access was not absolutely denied but only limited, that this case ought not involve analysis of a no-access rule and application of no-access legal precedent, but rather an analysis that balances its right to control the use of its property against the alternative effective means available for employee union advocates to proselyte despite limitations imposed. Of course, Respondent has not imposed an absolute universal no-access rule. However, Respondent has denied access to certain areas and to certain employees and this does constitute a no-access rule for them. Respondent argues that the limitation upon employees in any event meets the test for a no-access rule validity set forth by the Board in *Tri-County Medical Center*, 222 NLRB 1089 (1976), in which the Board evaluated the validity of a rule prohibiting plant access by off-duty employees. The Board in *Nashville Plastic Products,* supra at 463, reiterated that test, stating as follows:

> In *Tri-County*, the Board has held that rules limiting the access of off-duty employees are valid only if it:
>
> (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid [222 NLRB 1089 (1976)].

Respondent argues that it has met the business justification criteria of the test. Respondent, however, ignores the prerequisite that the restrictive rules must be disseminated to all employees, which they were not, and applied to all employees, not just those employees engaged in union activities. Here, the rules were initiated in response to the union campaign and applied only to employees involved in union activities, i.e., witness the toleration of any number of employees in the bus stop to obstruct the view of the east turnstile, and the toleration of an obstructive stationary Red Wing Shoe truck in the vehicular aisle near the east turnstile.

Respondent goes on to argue, pursuant to its suggested balancing analysis, its right to use its private property as it sees fit, particularly for safety concerns, must be balanced against the effectiveness of employee union advocates' alternative means of proselytizing within those limitations. Respondent argues that the General Counsel and the Union are seeking the absolute right of employees to engage in concerted activities anywhere anytime they desire despite its impact on Respondent's business. That is not the position of the General Counsel. Rather, the General Counsel argues that it is not within Respondent's prerogative to arbitrarily determine when, where and how many employees may exercise rights guaranteed by the Act. Further, the General Counsel argues that the test is not one of balancing interests as would be done with nonemployee union agents, but rather whether Respondent has satisfied the *Tri-County* criteria, including the demonstration of business justification for the limitation of off-duty employees' protected activities and that Respondent has failed that test in all of its restrictive access rules.

The balancing test advanced by Respondent is one which has been applied to nonemployee union agent visitors. See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The balancing test implicitly concerns itself with the right of a union to effectively carry its message to employees. The *Tri-County* test addresses the individual rights of employees. The Board has explicitly rejected the argument that *Lechmere* applies to its off-duty employees. The Board considers off-duty employees who seek access for handbilling to fall within the scope of Supreme Court precedent protecting their individual organizing activities. *Nashville Plastic Products*, supra at 46, citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978); *Eastex, Inc. v. NLRB,* supra; and *NLRB v. Le Tourneau Co. of Georgia*, 324 U.S. 793 (1945). The Board's citation of *Eastex* in its reaffirmation of *Tri-County* undermines Respondent's suggestion in its brief that *Eastex* establishes yet another kind of balancing analysis which, herein it argues, is the balancing of its managerial concerns, i.e., safety and security versus individual employee handbilling

rights. I conclude that the *Tri-County* test is the one now viable and applicable to the employee handbillers herein. In any event, the "balancing" suggested by Respondent may be just a variant restatement of the business justification analysis in *Tri-County*.

Under the *Lechmere* test, Respondent's defense has much appeal and what some might characterize as pragmatic sense. That is to say, the Union's message was apparently carried to incoming traffic north of the stop sign and to individuals entering the turnstiles by two handbillers who did so freely and without restraint. Yet, even under that analysis, the defense is vulnerable because of the limited ability of union supporters to proselyte and express support in the plant during very limited nonworking time under a plant no-solicitation/distribution rule. Further, regardless of whether the nonleafleting employees who stood with the leafleters at the turnstile actually said or did anything, their very physical presence rendered an effective statement of numerical support and mute appeal for support. As one of the employees testified, those entering the plant could see that employees could stand witness to the union cause without fear and they also could and were urged to do the same without fear. Close monitoring and limiting that activity tended to dissipate the impact of such message. In any event, under Board precedent, it is the validity of the business consideration that must be analyzed as justification for the deprivation of employees' rights to handbill or show support thereof at certain locations and times, and in numbers of their choosing rather than the Respondent's choosing under the *Tri-County* test as reaffirmed in *Nashville Plastic Products*, supra. See also *Fairfax Hospital*, 310 NLRB 299 (1993); and *Sweet Street Desserts*, 319 NLRB 307, 312–313 (1995), where it was held violative of the Act to promulgate a no-access rule solely in response to organizational activity without evidence of business justification.

With respect to the April 3–4 promulgation of a half-hour turnstile access rule under the guise of a different preexisting, no internal plant access rule, that conduct was clearly violative of the Act as it was done solely in response to union activity without business justification. It is not a trivial incident because certain employees suffered adverse personnel action, i.e., a negative counseling memorialization. Accordingly, a remedial order is necessary.

With respect to the turnstile and Route 330 entrance limitations, applying the business justification analysis, it is irrelevant that effective access was reached by many other union employee handbillers north of the stop sign and by two handbillers at the east turnstile. Certain employees were prohibited from engaging in concerted union activities a few feet south of the stop sign, I conclude, without compelling business reasons, and unrelated to the number of employees involved and specific area south of the stop sign, i.e., pursuant to an arbitrary decision of Respondent as to how and when it would permit those activities which tended to undermine the impact of the activities.

With respect to the east turnstile, there was no credible evidence of blocking threats, intimidation of any significance, unsafe traffic conditions, or group conflicts. That such problems might have occurred is based on pure speculation, not even premised upon past organizing campaign events. Respondent argues that yes, the view of the east turnstile was so obstructed even at the best of times and therefore it could tolerate no further obstruction. Yet, the evidence in the form of testimony and photographs fails to demonstrate that the limitation of two handbillers would provide any significant improvement. Furthermore, the need for a clear view to prevent magnetic card abuse was a nonexistent problem and one upon which there is no evidence to expect an occurrence. If, indeed, it had ever been a concern, there would have been a guard at the east turnstile or at least a clear view of it established.

With respect to the Route 330 entrance stop sign limitation, neither testimony, photographs, nor schematic plans offered into evidence cogently and clearly establish any basis for perceiving that it was safer for handbillers to stand closer to the highway traffic intersection in the center of the incoming road, than further south after vehicles negotiated their incoming turn and when only some of incoming traffic made a second and necessarily slower turn into the first lane of parking. It would have made more sense to have ordered the handbillers to stand out of the driveway itself if the premise was safety. The only instance of an unsafe incident was when one handbiller complained that an incoming vehicle nearly made contract with him. It is not clear whether the cause of the problem was leafleting south of the stop sign or more likely because the hand-biller was in the middle of the driveway. Arbogast's additional reason to maintain a clear view of the stop sign is not convincing. The handbillers were in the middle of the driveway and were not obscuring the sign which was on the side of the driveway. The north of stop sign rule, I conclude, was a mere arbitrary limitation imposed by the Respondent without regard to actual numbers of employees, actual conditions or actual location south of the sign for no apparent safety concern. I therefore conclude that all Respondent's access limitations were imposed without business justification, were not previously promulgated, were a direct reaction to the union campaign and were limited to union handbillers. I conclude that they constituted a demonstration of arbitrary authority and control of monitored union handbilling. I find that such access limitations and enforcement, including summoning the deputy sheriff, are violative of Section 8(a)(1) of the Act as alleged in the complaint.

With respect to the counseling, warnings, and suspensions, the Respondent claims that such actions were for insubordination. When an employee is discharged for conduct that is the res gestae of protected activities, the relevant question is whether the conduct was so egregious as to take it outside the protection of the Act. *Consumers Power Co.*, 282 NLRB 130, 132 (1986). Respondent cites cases not appropriate to the issue herein, i.e., precedent involving misbehavior in the course of concerted activities, e.g., *Earle Industries v. NLRB,* 75 F.3d 400 (8th Cir. 1996), and *Carolina Freight Carriers Corp.*, 295 NLRB 1080 (1989). The instant case is distinguishable. The employees herein did not engage in any misbehavior in the course of performing work duties nor did they refuse a work order in the course of asserting Section 7 rights. The off-duty handbillers herein, however, did refuse a dispersal order up to the point of counseling, warnings for those who persisted, and suspensions to a few who persisted further. The activity they were engaged in was not the performance of work tasks but rather union activities on their own time. They performed the hand-billing and support thereof in no insulting or offensive manner, albeit Arbogast

became incensed by their passive, sometimes nonacknowledging reception of his dispersal orders. The handbillers' presence would have been in no violation of any lawful access policy of the Respondent. Under the foregoing analysis, those orders were violative of the Act. The Board has long held that a refusal to comply with such unlawful order does not constitute unprotected insubordination, as the Union correctly argues, citing *Cooper Tire & Rubber*, 299 NLRB 942, 953 (1990), which case in turn cites, inter alia, *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 616 (1962). See also *Simplex Wire & Cable Co.*, 313 NLRB 1311, 1316 (1994), involving an unlawful discharge for a refusal to obey an unlawful order to cease protected activities in the plant; and *Olathe Healthcare*, 314 NLRB 54 (1994), also involving an unlawful enforcement of an overly broad solicitation/distribution rule.

Accordingly, I find Respondent violated Section 8(a)(1) and (3) of the Act by its enforcement of the unlawful access limitation rules through the issuance of counseling, warnings, and suspensions to employee union handbillers as alleged in the complaint.

With respect to the surveillance of the protected handbilling by photographs and by videotaping, Respondent asserts that it was simply done for defensive and noncoercive motivation. It is lawful for an employer to observe open union activity. However, continuous scrutiny over substantial periods of time may constitute coercive surveillance. *Nashville Plastic Products,* supra at 463–464. The test of validity of such conduct is whether there was proper justification and whether it reasonably tends to coerce employees. *F. W. Woolworth Co*., 310 NLRB 1197, 1204 (1993) (handbillers); *Athens Disposal Co*., 315 NLRB 87, 98 (1994); *Dayton Hudson Co.*, 316 NLRB 477 (1995) (leafleters at store entrance); and *Parsippany Hotel Management Co.*, 319 NLRB 114 (1995), and cases cited therein. The mere belief that something might happen to justify the recordation is insufficient when balanced against the tendency it may have to interfere with the free exercise of employee rights. *F. W. Woolworth,* supra.

Respondent's photographing and videotaping were not shown to be limited to times when Arbogast or the security guards conversed with the handbillers. It was continuous and unlimited and, I conclude, unjustified by the single, early episode involving Grandstaff. No similar confrontations occurred thereafter. I find that the pervasive photographing and videotaping unlawfully complemented the invalid access limitations and their unlawful enforcement and reasonably tended to discourage employees from engaging in or supporting lawful union handbilling and therefore was violative of Section 8(a)(1) of the Act as alleged in the complaint.

C. Removal and Confiscation of Union Literature

1. Bulletin board

The employee handbook sets forth a preexisting rule restricting the use of the plant bulletin boards to managerially approved materials. Employees have no statutory right to use an employer's bulletin board but, if permission is granted, it must not be accorded selectively and disparately to prevent union literature postings whereas other nonbusiness postings are permitted. *Honeywell, Inc.*, 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983). An employer who permits nonbusiness postings but excludes union related material violates the Act. *Kroger Co.*, 311 NLRB 1187, 1199 (1993); *Fairfax Hospital,* 310 NLRB 299, 304 (1993); and *Ford Motor Co.*, 315 NLRB 609, 613 (1994) (involving permitted postings of personnel notices).[4]

The General Counsel argues that prior to the 1995–1996 union campaign, the Respondent permitted its employees to post a variety of personal notices, cartoons, and newsprint articles. It is the Respondent's position that only business related matters were allowed to be posted on about 11 communication boards throughout the plant and "departmental boards" and that the supervisors have routinely enforced that rule by removing all other materials found there with one exception. Arbogast testified that the sole exception was that a personal condolence card or thank you card relating to a death in an employee's family may, on approval of the general manager or his agent, be placed by the supervisor for a short time only on the departmental board. Union literature was admittedly removed during the campaign from informational boards. The General Counsel adduced the testimony of employees Joyce Bordner, Diana Gabriel, Michael Shiefer, and Stephen Bishop as to the use of the bulletin boards. Bordner testified that she, on unspecified dates, observed thank you notes for flowers sent to bereaved or ill employees and undescribed cartoons posted on "bulletin boards" on her line in buildings 8(A) and (B). She testified that she saw unidentified supervisors and managers reading the cartoons but that she did not see them remove the cartoons. However, she testified they were removed subsequently after some undisclosed period of time. Even if those unidentified persons were in fact supervisors within the meaning of the Act, her testimony is so vague as to be nonprobative.

Similarly, Gabriel testified with the same vagueness that on unspecified dates she observed unidentified persons she characterized as "supervisors" read and walk away from one notice for one weekend hog roast at a blue grass festival held on the notice author's farm, an unspecified number of auction notices, sympathy cards and unspecified numbers of "notices for get well presents" posted on four bulletin boards in the area where she works in the "old cone finish" building 8A. She was silent as to what length of time, if any, those items remained posted.

Shiefer testified there are three bulletin boards where he works in building 8(A), cone finish, on the north wall. He testified that on unspecified dates "from time to time," he observed an unspecified number of auction notices authored by two hourly paid employees and one hog roast notice in October 1995 authored by an unnamed supervisor. He testified that at some unspecified time the auction notices were removed, as was the hog roast notice, the latter after the event. He admitted that he observed supervisors "eventually" removing the auction notices. In redirect examination, he testified that he also saw supervisors removing cartoons.

Bishop also works in building 8(A). He identified six bulletin boards at the end of the lines and one main one between the restrooms. He testified broadly that employees have posted "anything they want to put up there [on the line

[4] Respondent's cited authority to the contrary is *Guardian Industries Corp. v. NLRB*, 49 F.3d 317 (7th Cir. 1995), which rejected the Board's view and found that permitted personal notice of sales and social announcements did not constitute discriminatory conduct.

boards].” He observed auction notices, thank you notes from the ill or hospitalized, cartoons, newspaper clippings, and “just about everything under the sun.” None of the postings were described or otherwise identified. He testified that he observed supervisors tearing down and throwing away “certain things that they didn’t like or thought they shouldn’t be there,” which he did not identify, but that they did not remove the auction notices. He testified that he posted undescribed newspaper clippings on unspecified dates without permission and without being disciplined. In cross-examination, he admitted that he did not know whether all employees posted personal materials.

Respondent adduced the testimony of several supervisors. They testified that they routinely removed unauthorized materials, including auction notices and cartoons.

I agree with the Respondent that in a large plant of 850 production employees, there are bound to be some limited occasions when unauthorized materials have been posted. However, based on the very generalized, vague, imprecise, very limited testimony of 4 of the General Counsel’s 45 witnesses, I cannot conclude that Respondent had tolerated free use of its bulletin boards for unauthored personal notices to the extent that its removal of union literature can be found disparate or discriminatory. Thus I find no merit to this complaint allegation.

2. Cubbyhole and toolbox literature confiscation

Undisputed testimony reveals that union literature placed face up on top of employee purses and lunch bags in cubbyholes used by employees, as well as union stickers attached to the interior walls of the open-faced cubbyhole, were removed and confiscated on the grounds that the cubbyholes near the work area were the property of Respondent despite the fact that materials placed therein were the personal property of the employee.[5] Locker rooms are located away from the work area and there is no evidence of union literature confiscation in the locker rooms. Similarly, union literature was taken from the toolbox of employee and union activist Roger Eldridge on one occasion, May 4, when he placed a union leaflet face up on the top of his personally owned items therein at his work area on working time. According to the confiscating supervisor, he did so because the toolbox had been on the floor, which was Respondent’s property, in the working area even though no one was seen reading the leaflet.

The Respondent argues in the brief that the leaflets were removed pursuant to a proper nondiscriminatory enforcement of its solicitation rules because such open-faced literature was “capable of being read by people walking by during work hours” and, on their face, constituted a solicitation for support. Respondent’s responsible agents testified to the routine removal of nonunion litter and newspapers from the cubbyholes. Employee Cooley testified without contradiction that employees who wish to sell items such as candy or cookies place them in the cubbyholes. Employees who wish to purchase the items will place money in the cubbyhole and remove the items. She testified to a variety of sales on working time, but she was unclear where these sales were negotiated. She said some of them occurred in the locker room. She did not describe where the cubbyhole sale was negotiated nor how and where the pickup was arranged. There is no evidence that supervisors are aware of such sales by cubbyhole, and it is unclear how extensive the practice was and how evident that the material therein was for sale since the practice was apparently done by word of mouth. No specific cubbyhole is assigned to any specific employee.

Respondent’s argument rests on its contention that the material in the work areas was capable of being read by an employee walking by during working time, thus being subject to solicitation. Respondent tolerated the wearing of union insignia attached to employees’ work clothing and stickers attached to purses or other personal property during working time and work areas. See *Burger King Corp.*, 265 NLRB 1507 (1982); *Malta Construction Co.*, 276 NLRB 1494 (1985), for a discussion of employees’ presumptive right to wear union insignia.

In reality, any literature proffered for reading, whether by physical tender or by strategic placement for reading, constitutes a distribution albeit the message therein was a solicitation. I conclude that the Board’s test for validity of distribution limitation is the appropriate test herein. An employer may prohibit the distribution of union literature in working areas but a broad rule banning distribution during nonworking time in nonworking areas of the plant is presumptively invalid. *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, 616–621 (1962). A prohibition of union literature anywhere in the plant is presumptively invalid on its face where there is no shown need to maintain production and discipline. *Formosa Plastics Corp., Louisiana*, 320 NLRB 631, 632 (1996), citing *Stoddard-Quirk,* supra.

There is court precedent, contrary to the Board’s views, that it was lawful for an employer to order temporary employees to remove union stickers from hard hats which were company property on the grounds that since the employer recognized presumptive rights of employees to wear union insignia on their own clothing, including jackets owned by them, that the employer need not suffer its own property to be used as a “billboard” for the union. *NLRB v. Windemuller Electric,* 34 F.3d 384 (6th Cir. 1994), enfg. in part 306 NLRB 664 (1992) (the court applied a *Lechmere* test of validity).

The General Counsel’s theory of violation in regard to the leaflet confiscation rests upon alleged disparity of treatment. The only evidence of disparity cited in Cooley’s testimony, I find to be inconclusive. As a distribution, the placement of literature clearly occurred in the working areas on working time. If the placing of literature is a solicitation, it also occurred during working time in working areas. Neither conduct was shown to have been disparately treated. Accordingly, I find no merit to this complaint allegation.

[5] Roberta Shifflet testified to two instances of cubbyhole confiscation, one of which she claimed involved singled folded leaflet of distinctive color. The then Cupp Business Manager Menning testified that he removed several documents which he recognized as solicitation. I do not discredit the more certain Menning that the condition of the document or documents was such as to have enabled him to recognize it as an open solicitation for union support. Arbogast testified that it was Respondent’s policy and practice not to remove face down literature or that which is attached to employee property, or face down in toolboxes.

D. Disciplinary Enforcement of the No-Solicitation/Distribution Rule

1. The policy

Respondent's preexisting handbook rule prohibited solicitation or distribution of literature on working time. Arbogast testified that Respondent strictly enforces that policy and that supervisors are instructed that they should counsel individuals who solicit and if solicitation persists, disciplinary action should be taken. He testified that the Respondent has turned away charitable organizations, free pizzas, and discounts on food pursuant to the solicitation rule, and that, as corroborated by Supervisor Leslie Keiter, if supervisors notice the sale of Girl Scout cookies, candy bars for Little League, or other similar products, they are under orders to stop the solicitation.

The Respondent also makes a distinction between solicitation and conversation in that it permits employees to talk about the Union while on working time on the lines at their machines but prohibits solicitation for union support on working time. Arbogast testified that as long as employees are tending their machines without formal breaks and with only one 18-minute lunchbreak, Respondent does not care what they talk about. However, if they leave their machines and gather in a group, they will be ordered back to their machines. He defined solicitation as, "when someone tries . . . to solicit for the procurement of, or sale of goods, for the acquisition of something for the sale of something." He gave as examples in addition to the sales of cookies and candies, the membership in fraternal organizations.

The prohibition of any protected activity, including union solicitation in work areas during nonworking time, is presumptively unlawful. *Brunswick Corp.*, 282 NLRB 794, 795 (1987), and cases cited therein; *Ford Motor Co.*, 315 NLRB 609 fn. 2 (1994), citing *Brunswick.* The General Counsel, however, argues that Respondent disciplined, i.e., counseled, employees Roberta Shifflet on about March 8, 1996, James Knapp on about March 9, and employees Roger Pfleiderer, Richard Sharp, and John Harvey on about May 23 as a result of a disparate enforcement of its working time, nonsolicitation rule. Respondent admits the counseling but denies any disparity of treatment and contends further that the May 23 counseling of those three employees related to a violation of its preexisting handbook rule prohibiting the harassment and abuse of coworkers. It contends that those three employees harassed a coworker in a solicitation related incident.

2. Evidence of disparate treatment

The General Counsel argues that "solicitation on the work floor during worktime was fairly commonplace," and that Respondent's enforcement of its solicitation rules was "sporadic at best."

Only four of the General Counsel's witnesses testified in support of the disparity allegation, i.e., employees Pfleiderer, Knapp, Cooley, and Louis Niedermier.

Pfleiderer testified to a past practice of supervisor toleration of employee talking during working time in working areas. He testified that there were occasions when he discussed the Union during working time in working areas during which he sometimes stopped work. He was counseled on May 23, 1996, for harassment of a coworker but not for talking about the Union. The incident will be discussed more fully hereafter.

Knapp's testimony in direct examination regarding solicitation toleration was very generalized and conclusionary, i.e., he saw during the entire period of his employment from 1968 "people [employees?] selling raffle tickets for a volunteer fire department, your Girl Scout cookies, Little League Ball, a lot of community activities, people bring in things for their kids to sell and that's for the community type [sic]." He gave no names, dates, locations, or any circumstances except that it occurred "at work." He answered, "Oh, yes, they're aware of it" to counsel for the General Counsel's question of whether unnamed supervisors and management were aware of it. In cross-examination, he testified that the solicitations occurred "in the working site" in front of "supervision." However, he could not identify specific occasions when a supervisor was present, but he identified his own supervisor, Leslie Keiter, as having been present. Again, he could not recall any specific occasion when Keiter was present. He was asked and he answered:

> Q. Throughout the time that you have been with the company, has the company had this rule prohibiting solicitation?
>
> A. Yes, that I know of.

Niedermier testified that he has seen during working time and in working areas employees soliciting for "lotteries—football lotteries, state lotteries, different ticket sales, candy bar sales, shoe sales." He only identified one such occasion. On April 10, 1996, he observed an hourly rated employee, Lee Holt, selling candy bars of which two candy bars were sold to Niedermier's supervisor, Beatrice Morton, at an undescribed work area where Niedermier does his 2 o'clock routine scrap check. He gave no further details, i.e., whether it was Holt's working time or personal breaktime.

Cooley testified that "at work," she observed other unnamed employees at undisclosed times and places sell Girl Scout cookies, Little League candy bars, raffle tickets, and bicycles. She testified that currently, she observed sales for "Chef's Pride," a specialty kitchen utensil. She answered "[Y]es," to counsel for the General Counsel's question as to "whether any of these products are sold during work time." She did not explain. She testified that "supervisors," including every supervisor she ever had, bought candy bars and cookies to benefit school children from herself and other employees "on work time." She named no other supervisor. She gave no details as to location nor explanation as to whose worktime was involved, i.e., herself or other employees. Her current supervisor for a year and a half is Dave Bailey. In cross-examination, more elucidation was elicited. She admitted awareness of the handbook's working time, solicitation prohibition but claimed it had never been enforced. She admitted that yes, soliciting employees could have been counseled without her awareness. She identified fellow employee Kim Sebring as having sold candy bars with her in May 1996 and an employee named Tisha who sold the kitchen utensils. She explained that Tisha executed the sales in the locker room by leaving her order booklet in the locker room for employees to make the sale order there. As noted elsewhere, with respect to the cubbyhole issue, she described how she left something, probably another order booklet in the bathroom, and using the cubbyhole as a drop-pickup site for candy bars and cookies. She could not identify any other

employee in her 8 years of employment who violated the working time, no-solicitation rule.

Supervisor Keiter denied having ever observed the solicitation for sales by employees in the work area and stated that he would have enforced the solicitation policy if he had done so by confrontation and counseling. Supervisor Morton denied that she purchased candy bars from employee Holt on April 10 and denied that she observed such sales and insisted with certitude and conviction that she would not tolerate such sales. Both Keiter and particularly Morton testified with greater certainty and more persuasively than Knapp and Niedermier. I credit Keiter and Morton. Bailey did not testify, but Cooley's testimony is so imprecise, conclusionary, and uncertain as to be of no probative value.[6] Her cross-examination revealed that the only solicitations she could specifically recall occurred in the bathroom and locker rooms. As to the pickup at the cubbyhole, there is no evidence that it was witnessed by a supervisor.

Regardless of the credibility of the General Counsel's witnesses, the testimony of 3 of 45 witnesses of 850 employees is too generalized, imprecise, and conclusionary to support a finding of widespread Respondent toleration of nonunion solicitations on working time. I cannot conclude that enforcement of the solicitation rule against union solicitations during working time would constitute disparate treatment.

Furthermore, if the Respondent had enforced the no working time solicitation in the locker rooms, the bathroom, and on personal breaktime, it might have been liable to a charge of unlawful interference inasmuch as such time in workplaces, when employees are not actively working, is not considered by the Board to constitute working time despite the fact that employees are paid for such time. *Sweet Street Desserts, Inc.,* 319 NLRB 312–313 (1995); see also *Our way, Inc.*, 238 NLRB 209, 214 (1978); *Ichikoh Mfg. Inc.*, 312 NLRB 1022 (1993); and *Wellstream Corp.*, 313 NLRB 698, 703 (1994).

3. The counseling of Shifflet and Knapp

The General Counsel alternatively argues that according to Shifflet and Knapp, they merely talked to other employees on working time about the Union and did not solicit union support. Knapp admitted that he had a conversation with a coworker on working time wherein he told the coworker that he thought the employees needed a union. This does not come within Arbogast's above-noted definition nor the counseling supervisor Keiter's definition of solicitation, i.e., trying to sell or "push" something or someone. According to Knapp, he merely expressed an opinion.

Shifflet testified that she merely inquired of coworker Mike Young whether he had signed a union card while on her personal relief break. She had no union cards and did not solicit his signature. It is not clear whether Young was engaged in active working at the time. He did not testify. Shifflet denied, however, any other union card-referenced conversations. I agree that such casual inquiry would not fall within Respondent's agents' definition of solicitation. She was counseled by Supervisor Ridge for solicitation during working time.

Respondent proffered the testimony of Keiter and Ridge to prove that Knapp and Shifflet's conduct went beyond what they had testified. They, however, acted upon reports of employees who reported the solicitation. The employees did not testify. I must credit the testimony of Shifflet and Knapp inasmuch as the contradictory hearsay is obviously nonprobative of actual misconduct.[7]

At best, I find that Respondent had reasonable cause to believe that the two employees had engaged in misconduct during the course of protected activities not inconsistent with plant rules, i.e., merely talking about the Union. The Respondent has raised a presumption of misconduct which the employees have rebutted. Thus, Respondent has acted at its risk in adversely counseling two employees who had engaged in protected activities while committing no actual misconduct and therefore Respondent violated Section 8(a)(1) of the Act. *Keco Industries*, 306 NLRB 15, 17 (1992), citing *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964); and see also *Alexander Linn Hospital Assn.*, 244 NLRB 387 (1979).

4. The counseling of Pfleiderer, Sharp, and Harvey

The above-named three employees were adversely counseled for harassment of a fellow employee. The Harvey counseling was not alleged in the complaint, but he was allegedly involved in the purported union-solicitation harassment of employee Shauna Moore on about May 23, 1996, as were Pfleiderer and Sharp.

Respondent had maintained a preexisting rule against "fighting, striking, threatening or intimidating another [employee] or supervisor, committing any act of violence or improper or immoral conduct, using abusive, profane, or improper language to another [employee] or supervisor."

I credit Moore's testimony where it conflicts with that of Pfleiderer or Sharp. She testified in a fluently, vivid, more spontaneous and more certain and sure, convincing manner than did Pfleiderer or Sharp. Accordingly, I find that the following events occurred. On May 22, 1996, during working hours on the afternoon shift during working time, Pfleiderer admittedly unsuccessfully solicited employees to pass out union literature and in so doing, admittedly upset them. Moore was one of those who refused. Pfleiderer persisted in asking her if her coworker, Sherry Wells Young, was interested in passing out literature. Moore answered, "I don't know. Ask her. There she is." Her tone of voice in recounting the incident indicated that she responded to Pfleiderer in an impatient or exasperated manner. Wells Young came up next to her just as Pfleiderer finished his question, but Moore walked away at that point. On the afternoon shift of May 23, 1996, as Moore approached the east turnstile, Pfleiderer extended a union flyer to her. She declined, saying "[N]o thank you." He retorted "[T]ake the goddamn thing." She angrily responded with an obscenity. During the course of her working time that night, Sharp, a past good friend, approached her. She told him she was upset with Pfleiderer's solicitation attempts. She told him that she had attempted to retrieve and rescind her union card. Sharp angrily and loudly

[6] Bailey's supervisory status is not alleged in the complaint and it was not litigated. There is a Larry Morton alleged as a supervisor but not a Beatrice Morton.

[7] I do not view Ridge's testimonial account of Shifflet's counseling response as an admission of misconduct, "Well, I didn't realize I was doing that, I understand now." In any event, I find her contradictory version of the conversation more certain, convincing and spontaneous and more credible.

persisted in trying to get her to explain why. She did so. More, a relatively young person, answered that she acted upon her father's advice. Sharp yelled out that her father was a stupid son of a bitch and that she was stupid if she followed his advice and otherwise reproved her. Sharp, an older, more mature person, was shouting and thrust his finger in her face. She unsuccessfully tried to move away from him. She began to visible shake and she wept. She testified that Wells Young had attempted to come to her aid by remonstrating with Sharp but that Harvey appeared and restrained Wells Young and caused more commotion. Sharp departed as Moore's supervisor approached. She complained to her supervisor, Richard Spradlin, about Sharp and asked for permission to go home. Spradlin reported the incident to Arbogast. Moore had also complained to Spradlin of Pfleiderer's solicitation attempts that preceded the Sharp confrontation.

Harvey admitted that he observed from a short distance on the next job Moore "having problems" with Sharp, i.e., she was shaking and "almost in tears." He asked if she were all right and she complained that Sharp had harassed her and that Pfleiderer had pushed literature at her. He confirmed that she complained at that time that Sharp had said things about her father and that it was apparent to him that she was defending her father. Harvey claimed that Sharp had started moving away as Harvey approached. Harvey denied that he even talked to Wells Young or blocked her attempts to join the conversation. Wells Young was not called to testify. I find the testimony of Moore more convincing than the less spontaneous Harvey.

I conclude that Respondent has established sufficient factual justification for its counseling of Pfleiderer, Sharp, and even Harvey, although the complaint was never amended to include Harvey. Pfleiderer, in any event, violated the no-working time solicitation rule and would have been liable for counseling for violation of that rule, if not harassment. Similarly, Sharp's abusive hectoring of Moore's desire to withdraw her union support also constituted grounds for liability under the no working time solicitation rule. Accordingly, I find no merit to the complaint allegation regarding the May 23 counseling of Pfleiderer and Sharp. Finally, I do not find that Harvey was engaged in any union or concerted protected activity regardless of his actual culpability for misconduct.

E. The Open Door Incident

The General Counsel alleges that on April 25, 1996, Respondent violated Section 8(a)(1) of the Act by the conduct of its agent, Donald Leitzy, by his threatening of employee David Kelley with discipline for viewing out from within the plant, through an open overhead garage-like door, employees engaged in the concerted protected union leafleting at the east turnstile.[8]

On April 11 or April 25, 1996, as on other Thursdays, a group of employees gathered at the east turnstile. Arbogast testified that while explaining Respondent's policy regarding the turnstiles to the employees present at the east turnstile that morning, he observed a group of employees gathered in the heat treat doorway of the bearing plant. The doorway is a 16-foot overhead door which resembles a large garage door. Arbogast summoned a supervisor, Donald Leitzy, and informed him that a group of employees had gathered in that doorway. By the time Leitzy arrived at the door, David Kelley was the only person in the area. Leitzy testified that he asked Kelley if he was standing in the doorway observing what was going on at the east turnstile and that Kelley responded that he was observing the events at the east turnstile but that this was his work area. According to Leitzy, Kelley's response ended the conversation. He denied that he told Kelley that he "could be punished" for viewing the leafleting.

According to Kelley, Leitzy also told him that the door would be closed thereafter, to which Kelley responded that it was a ridiculous thing to do because of the extreme heat in that part of the plant. Kelley testified that Leitzy retorted: "This–it will be closed and this is an oral warning." In cross-examination, although Kelley conceded that he did not consider himself to be disciplined per se, he reiterated that he had been orally warned, i.e., warned of future discipline. He testified:

> He really just told us to stay away from there, the whole area, and I said, this is my work area. And when I pursued it, he told me this is an oral warning.

There is no dispute that Kelley was in his work area at the time of the viewing. There is no evidence that he halted his work activities nor neglected them for any significant time. Leitzy did not dispute Kelley's protest to him that he was in his work area. Leitzy admitted that Kelley was normally permitted to walk to the door which is concededly in his work area to get cool air and that he had at least a partial view of the machines he was running from the doorway. Thereafter, the door was opened only to waist level on Thursdays so that employees would not be enticed to the doorway. This conduct is not alleged to be unlawful.

With respect to any differences in their testimony, I credit Kelley over Leitzy. Kelley was more detailed, assured, spontaneous, and convincing.

I conclude that Kelley was orally warned of unspecified adverse personnel action if he were to view outside union activities from the doorway in his work area regardless of the status of his work, or any interference with it, and regardless of whether he was simply getting a breath of air or walking by the doorway. By such disparate conduct, I find that Respondent, by its agent Leitzy, violated Section 8(a)(1) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. As found above, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, Respondent has violated Section 8(a)(1) and (3) of the Act and, further, I find such violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. Having found that Respondent unlaw-

[8] Leitzy testified that the events occurred on April 11. He testified that he acted pursuant to an instruction by Arbogast who also testified that the date was April 11.

fully in the enforcement of its access, solicitation and distribution rules, counseled and issued written warnings to employees and suspended employees in March, April, May, and June 1996, as reflected in Joint Exhibit 1 "Record of Associate Infractions and Actions of The Timken Company," I shall recommend that it remove all records of such personnel actions wherever located in any of its files and make all employees who were suspended under such enforcement[9] whole for any loss of earnings and other benefits, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, The Timken Company, Bucyrus, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully and disparately prohibiting employees from engaging in the discussion of union matters while working.

(b) Unlawfully threatening employees with discipline for viewing employees engaged in union handbilling.

(c) Implementing and disparately enforcing rules which limit the access of off-duty employees engaged in concerted protected union activities to areas other than the interior plant and other work areas, including plant public highway entrances and pedestrian turnstile entrances, without business justification for such limitation.

(d) Adversely counseling, warning, suspending, or otherwise disciplining employees for violations of the above referred to unlawful access rules.

(e) Unlawfully coercing employees engaged in union handbilling by summoning local police authorities to disperse them.

(f) Unlawfully videotaping and/or photographing employees engaged in union and/or protected concerted activities.

(g) In any other like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful access rules described above, in writing, and notify all employees of such.

(b) Remove all disciplinary warnings, notes of counseling sessions, suspensions, investigatory, or otherwise, and all other discipline given to employees in March, April, May, and June 1996 in enforcement of the above-described unlawful access limitation rules as described in the remedy section of this decision or thereafter, in whatever file they may be contained, and notify those employees, in writing, with a copy to the Regional Director, that such expungement has been accomplished.

(c) Make all employees whole for all monetary losses suffered as a result of their unlawful suspensions in the manner set forth in the remedy section of this Decision.

(d) Within 14 days after service by the Region, post at its Bucyrus, Ohio facilities copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 1, 1996.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unlawfully and disparately prohibit employees from engaging in the discussion of union matters while working.

WE WILL NOT unlawfully threaten employees with discipline for viewing employees engaged in union handbilling.

WE WILL NOT implement and disparately enforce rules which limit the access of off-duty employees engaged in concerted protected union activities to areas other than the interior plant and other work areas, including plant public highway entrances and pedestrian turnstile entrances, without business justification for such limitation.

WE WILL NOT adversely counsel, warn, suspend, or otherwise discipline employees for violations of the above referred to unlawful access rules.

WE WILL NOT unlawfully coerce employees engaged in union handbilling by summoning local police authorities to disperse them.

WE WILL NOT unlawfully videotape and/or photograph employees engaged in union and/or protected concerted activities.

WE WILL NOT in any other like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[9] Excluding the harassment counseling to Sharp, Pfleiderer, and Harvey on May 23, 1996, and the parking tickets to Ralph Hart on April 3 and May 5, 1996.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL rescind the unlawful access rules described above, in writing, and notify all employees of such.

WE WILL remove all disciplinary warnings, notes of counseling sessions, suspensions, investigatory, or otherwise, and all other discipline given to employees in March, April, May and June 1996 in enforcement of the above-described unlawful access limitation rules or thereafter, in whatever file they may be contained, and WE WILL notify those employees, in writing, with a copy to the Regional Director, that such removals has been accomplished.

WE WILL make all employees whole for all monetary losses suffered as a result of their unlawful suspensions.

THE TIMKEN COMPANY